

IN THE MATTER OF TAIPAN RESOURCES NL (No 5)

These are the reasons for our decision to affirm the decision of ASIC dated 1 December 2000 in relation to the dispatch of the target's statement of Taipan Resources NL on the application for review by Troy Resources NL under section 656A of the Corporations Law.

REASONS FOR DECISION

INTRODUCTION

1. The Panel in this matter is constituted by Simon McKeon (President), Professor Ian Ramsay (sitting Deputy President) and Denis Byrne.
2. These are the reasons for our decision on 6 December 2000 to affirm, and thereby refuse to vary or set aside, a decision under section 655A of the Corporations Law (the **Law**) by the Australian Securities and Investments Commission (**ASIC**) dated 1 December 2000 to allow Taipan Resources NL (**Taipan**) more time to dispatch its target's statement. The decision was made in response to an application by Troy Resources NL (**Troy**) on 4 December 2000 for review of the ASIC decision under section 656A.¹

BACKGROUND

Troy's takeover bid

3. This application relates to a takeover bid for Taipan by Troy. Troy announced a proposal to make a cash offer of 7.6 cents per share for all fully paid ordinary shares in Taipan on 19 September 2000. On 21 September 2000, Troy announced that it would also make an offer of 0.65 cents per share for all partly paid ordinary shares in Taipan. In its announcement to the ASX, Troy stated that:

“This offer will only be made if the following pre-condition is met:

** the merger proposal between Taipan and St Barbara Mines Limited being put before Taipan shareholders at a general meeting of Taipan to be held on 21 September 2000 (or any adjournment thereof) is not approved by Taipan shareholders or otherwise does not proceed.”²*

4. The proposed merger between Taipan and St Barbara Mines Limited (**St Barbara**) is by scheme of arrangement between St Barbara and its share and option holders. Three court-ordered meetings of St Barbara's share and option holders regarding the merger took place on 13 October 2000. The resolutions put to the St Barbara meetings to approve the merger

¹ Statutory references are to provisions of the Corporations Law, as in force at 6 December 2000.

² ASX Release, *Troy Resources NL conditionally proposes a cash offer*, Troy Resources NL, 19 September 2000, 1.

were passed. A resolution approving the merger was also passed at a meeting of Taipan shareholders held on 12 October 2000. The scheme of arrangement is currently awaiting final approval by the Supreme Court of Western Australia. Objections to the scheme are currently scheduled to be heard by the Court on 15 January 2001.³

ASIC exemption

5. On 2 November, Troy obtained an ASIC exemption under section 655A (the ***ASIC Exemption***) to allow it to make offers under its takeover bid despite the fact that the pre-condition to its bid had not been satisfied. ASIC granted the exemption on the following conditions:

“The offers under the Takeover Bid:

(a) *do not include the pre-condition contained in the Public Proposal;*

(b) *include the following defeating condition:*

“The Court dismissing, or St Barbara discontinuing, St Barbara’s application (Supreme Court Matter COR 197 of 2000) to approve the Share Scheme and Option Scheme pursuant to s.411(4) of the Corporations Law.”; and

(c) *provide to the effect that the defeating condition set out in paragraph (b) above cannot be waived by the Bidder.”⁴*

6. Troy lodged its bidder’s statement with ASIC on 2 November 2000 and included a non-waivable condition in accordance with the ASIC condition (the ***Defeating Condition***). Troy’s bidder’s statement was dispatched to Taipan shareholders on 17 November 2000.
7. On 27 November, Troy applied to ASIC under sections 655A and 109ZB(5) for a variation of the ASIC Exemption so that Troy would be able to waive the Defeating Condition (the ***Condition Application***).

ASIC’s decision re dispatch of target’s statement

8. Under section 633(1), Taipan was required to lodge and dispatch its target’s statement no later than 1 December (being no later than 15 days after Taipan received notice that Troy had sent all offers under its bid). In order to meet this deadline, Taipan had prepared a target’s statement by 29 November on the basis that the Defeating Condition could not be waived by Troy.

³ Further background information on the scheme of arrangement and previous applications to the Panel in relation to the scheme of arrangement and Troy’s takeover bid may be found in the Panel’s reasons in *Re St Barbara Mines Ltd (11 October 2000)*, *Re Taipan Resources NL (No. 1) (20 October 2000)* and *Re Taipan Resources NL (No. 2) (16 November 2000)*.

⁴ ASIC Declaration under subsection 655A(1), 2 November 2000, 1.

9. The target's statement that Taipan had prepared in anticipation of dispatch by 1 December recommended that Taipan shareholders should take no action until after the issues before the Court in relation to the St Barbara scheme of arrangement were resolved. On that basis, Taipan considered it would be inappropriate to canvass the merits of the terms offered by Troy's takeover bid. Taipan advises that it had intended to provide its shareholders with a supplementary target's statement if the issues before the Court were resolved while Troy's bid was still open.
10. On 29 November, Troy announced to the ASX that it had made the Condition Application on 27 November.⁵ After Troy's announcement, Taipan applied orally to ASIC for relief to allow it to delay lodgment and dispatch of its target's statement until it knew the outcome of the Condition Application. Taipan's application was made on the basis that substantial amendment to the target's statement would be required if the Condition Application was granted by ASIC. Taipan submitted that the nature of Troy's bid and the position of Taipan shareholders would be significantly altered if Troy was able to waive the Defeating Condition.
11. On 29 November, ASIC gave Taipan in-principle approval to its application, and on 1 December, ASIC executed an instrument under section 655A(1) (the ***Target's Statement Modification***) to allow Taipan to lodge and dispatch its target's statement as follows:
 - (a) where ASIC refuses to grant the Condition Application, by no later than two business days from the day of refusal; and
 - (b) where ASIC exercises its powers under section 655A in any manner as a consequence of the Condition Application, by no later than five business days from the exercise of ASIC's powers as a consequence of the Condition Application.⁶

ASIC's refusal of Condition Application

12. Troy applied to the Panel under section 656A on 4 December for review of ASIC's decision to allow more time for Taipan to lodge and dispatch its target's statement. On 5 December, the Panel issued a brief under Regulation 20 of the *Australian Securities and Investments Commission Regulations* in which the parties were asked to make submissions on various issues. In paragraph 9 of the brief, the Panel asked the following question of the parties:

⁵ ASX Release, *Notice re: Defeating Condition to Taipan Takeover Bid*, Troy Resources NL, 29 November 2000, 1.

⁶ ASIC Declaration under subsection 655A(1), 1 December 2000.

“If ASIC refuses the Condition Application today or tomorrow, is there any reason for the Panel not to decide immediately to allow ASIC’s current relief to stand (given that it will take two days for Taipan to print its target’s statement)?”

13. If ASIC refused to grant the Condition Application, the terms of the Target’s Statement Modification required Taipan to dispatch its target’s statement within two business days. Taipan had decided not to print its target’s statement until it knew whether it would be required to make changes to its existing target’s statement as a result of the Condition Application being granted by ASIC. It was accepted that it would take two days for Taipan to print its existing target’s statement and dispatch it to shareholders.
14. On 5 December, ASIC notified Troy that it had decided to refuse the Condition Application for Troy to be able to waive the Defeating Condition.⁷ The effect of this decision was that Taipan would be required to dispatch its bidder’s statement by no later than 7 December 2000 under the Target’s Statement Modification.

THE APPLICATION

15. The application by Troy sought a review under section 656A of ASIC’s decision to grant the Target’s Statement Modification to Taipan. Troy’s application, in effect, requested the Panel either to vary the decision of ASIC to grant the Target’s Statement Modification or to set aside the decision and substitute a new decision so that Taipan would be required to dispatch its target’s statement within two business days after the date of the Panel’s decision.⁸
16. The grounds on which Troy’s application sought a review of the ASIC decision may be summarised as follows:
 - (a) Taipan shareholders would have insufficient time to consider the target’s statement and Troy’s offer between receiving the target’s statement and the scheduled date for the close of Troy’s bid;
 - (b) the changes Taipan needed to make to its target’s statement were minimal and required no extra time;

⁷ Letter from ASIC (Sam Pillera) to Bennett & Co dated 5 December 2000.

⁸ Troy’s application in fact sought an order that Taipan dispatch its target’s statement within two business days after the date of the Panel’s decision. However, the Panel does not have the power to make orders on review of an ASIC decision under section 656A. Instead, the Panel must decide whether to affirm, vary or set aside the ASIC decision. A decision by the Panel to vary or set aside the ASIC decision would have much the same effect as the order sought by Taipan.

- (c) Troy should not be required to extend its bid period to facilitate Taipan's delay in dispatch of its target's statement; and
- (d) ASIC failed to consult Troy in considering Taipan's application.

DECISION

17. Under regulation 20 of the ASIC Regulations, we decided to conduct proceedings in this matter.
18. We decided to affirm the ASIC decision to grant the Target's Statement Modification. We declined to vary or set aside the decision of ASIC because, in the circumstances, the effect of ASIC's decision was the same as the effect of any varied or substituted decision that the Panel could reasonably have made if it had found in Troy's favour.
19. ASIC refused to grant the Condition Application on 5 December. As a result, Taipan was required to dispatch its target's statement to shareholders by 7 December. The earliest day that the Panel could have made a decision was 6 December. If it had found in Troy's favour, the Panel's decision would have had the effect of requiring Taipan to lodge and dispatch its target's statement by 8 December (ie. two business days after the Panel's decision). In the circumstances, the Panel could not reasonably or practically have made a decision requiring Taipan to lodge and dispatch its target's statement before 7 December.
20. Troy and Taipan lodged their submissions in response to the Panel's brief after being notified of ASIC's decision to refuse the Condition Application. The submissions of Troy and Taipan in response to paragraph 9 of the Panel's brief agreed with the reasoning of the Panel that, in the circumstances, there was no reason for the Panel not to affirm ASIC's decision.
21. As a result of the Panel's decision to affirm ASIC's decision on this basis, it was not necessary for the Panel to consider, or make a decision in relation to, the various grounds of review set out in Troy's application.
22. We granted all parties leave to be represented by their solicitors. There will be no order for costs.
23. We thank all parties who made submissions.

Simon McKeon
29 December 2000